



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(Petitioner)  
c/o Attorney Thomas LaFave  
Malm & LaFave  
5900 N Port Washington Road Suite 210  
Milwaukee, WI 53217

DECISION

MED-40/46897

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 16, 2000, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regards to the denial of Medical Assistance (MA), a hearing was held on January 10, 2001, at Milwaukee, Wisconsin. At the request of the petitioner, the record was held open for 10 days for the submission of a written argument.

The issue for determination is whether the county agency correctly denied the petitioner's application for MA due to a divestment of assets.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(Petitioner)  
c/o Attorney Thomas LaFave  
Malm & LaFave  
5900 N Port Washington Road Suite 210  
Milwaukee, WI 53217  
Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Tania McCarthy, ESS  
Milwaukee County Dept Of Human Services  
1220 W. Vliet St, 3rd Floor  
Milwaukee, WI 53205

**EXAMINER:**

Kenneth D. Duren  
Administrative Law Judge  
Division of Hearings and Appeals

## **FINDINGS OF FACT**

1. The petitioner, (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Milwaukee County; she applied for Institutional – MA on August 14, 2000; her husband, Steven, died on April 3, 2000.
2. On September 15, 1999, the petitioner and her husband executed a Marital Property Agreement that provided that each was to hold all real and personal property which he or she owns or acquires thereafter, in his or her sole name free of any claim of right by the other. (See, DHA Case No. MED-40/46472, File [for prior recent related hearing] attached Exhibit #9.) On that same date, her husband, as settlor, executed a revocable trust document conveying to the trust \$25 in cash and all of his other tangible personal property. His son, William, as trustee, was to distribute all income from the trust to Steven on a quarterly basis, together with any part of the principal the grantor requested, unless the settlor became incapable of managing his affairs; then the income or principal was to be used in the trustee's discretion for the reasonable support, health & maintenance of the settlor. (See, DHA Case No. MED-40/46472, File [for prior recent related hearing], attached See, Exhibit #10, p.2.) Finally, upon death of the settlor, the trust was to terminate and the remaining assets in the trust were to be distributed to his son outright as his property. Ibid.
3. The investment account described in Finding #2 was a trust account titled in the names of Steve (xxxxx) & William (xxxxxx), Trustee, for the Steve (xxxxx) Revocable Trust, at the time of Steven's death, the value of the trust *res* was at least \$192,916.86 (i.e., \$111,310.43[Quick & Reilly securities account] + \$81,606.43 [in real estate proceeds]). See, Exhibit #6 & #8, p.2. (See, also, DHA Case No. MED-40/46472, File [for prior recent related hearing], attached Exhibit #7; showing a closing balance on June 30, 2000, in the securities account, alone, of \$233,202.24).
4. The county agency issued a negative notice on November 3, 2000, informing the petitioner that her application for Institutional – MA was denied due to a divestment of assets, without specifying further the amount divested nor the penalty period. (See, DHA Case No. MED-40/46472, File [for prior related recent hearing], attached Exhibit #4.)
5. The petitioner filed an appeal with the Department on November 16, 2000, contesting the action described in Finding #4, above.
6. Subsequent to the receipt of the appeal described in Finding #5, the county agency issued a Negative Notice on January 4, 2001, informing the petitioner that a divestment of assets on March 3, 2000, resulted in the petitioner's MA ineligibility from June 21, 2000, through March 31, 2004. The agency had been given the incorrect date of death of the petitioner's husband; it computed the penalty period using a divested total of \$192,916.86. The Notice used did not demonstrate how the penalty period was calculated.
7. At the hearing, the petitioner's attorney indicated a desire to proceed with a hearing on that day concerning both the November 3, 2000, and January 4, 2001, negative notices issued by the county agency, without the need to reschedule.

## **DISCUSSION**

A divestment is a transfer of assets for less than fair market value. WI Stat § 49.453(2)(a); MA Handbook, Appendix 14.2.1. A divestment of trust assets made within 60 months prior to an application for Institutional – MA by an institutionalized individual, her spouse, or another person on behalf of either, may cause ineligibility for that type of MA. WI Stat § 49.453(1)(f), Stats.; WI Stat § 49.454(1); see also, MA Handbook, App. 14.3.0; and see, 42 U.S.C. § 1396p(c)(1)(B)(i). This scrutinized past period is known as the “lookback period”. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as “MA card services” in the parlance). The penalty period is specified in WI Stat

§ 49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services [currently \$4,075].

The issue here is whether a divestment occurred barring the petitioner's eligibility for MA for such a penalty period. Two dates are of importance in performing the instant analysis. September 15, 1999, and April 3, 2000. On September 15, 1999, the petitioner and her husband mutually executed a Marital Property Agreement and her husband executed a Revocable Trust.

First, since July, 1990, a transfer of non-homestead property to a spouse cannot affect MA eligibility. MA Handbook, Appendix 14.4.0, item #8 (04-01-99); WI Admin. Code § HFS 103.065(4)(cm). Thus, there is no divestment in the creation of the Marital Property Agreement. See also, DHA Case No. MDV-51/38427 (Wis Div Hearings Appeals March 4, 1999)(DHFS), at p. 3. This conclusion is buttressed by the fact that MA statutes consider a divestment of assets as encompassing the transfer of assets for less than fair market value by *either* spouse, regardless of which of them holds title to the assets transferred. See, WI Stat § 49.454(2). That is why a transfer between spouses does not matter for divestment purposes.

Second, for MA purposes, a transfer *to* a revocable trust is not a divestment event. WI Stat § 49.454(2) provides that assets held by a revocable trust that was created by a recipient or the recipient's spouse are considered to be available assets, countable against the MA asset limit. See also, WI Stat § 49.454(1)(a); and see, similar Decision in DHA Case No. MDV-23/43023 (Wis Div Hearings Appeals April 5, 2000)(DHFS), at p. 3.

The events of September 15, 1999, were not divestments, standing alone.

On April 3, 2000, the petitioner's husband died. The remaining question is whether his death creates a divestment event. Wisconsin MA divestment law provides as follows:

INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES. (a) *Institutionalized individuals.* Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person action on behalf of the institutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible for the following services for the period specified under sub. (3);

1. For nursing facility services.
2. For a level of care in a medical institution equivalent to that of a nursing facility.
3. For services under a waiver under 42 USC 1396n.

WI Stat § 49.453(2).

The MA Handbook, Appendix 14.12.0, discusses trusts by dividing them into revocable and irrevocable classes. The Handbook states that revocable trusts are countable assets for MA, while irrevocable trusts are unavailable. A revocable trust must be interpreted according to the four corners of the document and the intent expressed therein. The petitioner's attorney admits that this trust instrument does not provide for its conversion to an irrevocable trust on the event of his death. See, Brief of Thomas LaFave, dated January 22, 2001, at p. 1; see also, , DHA Case No. MED-40/46472, File [for prior recent related hearing], attached See, Exhibit #10. Rather, the revocable trust provides only that upon the husband's death, the trust terminates and the *res* is to be distributed to the named beneficiary. For a discussion of the law of trusts in Wisconsin generally, see *McMahon v. Standard Bank & Trust Company*, 202 Wis. 2d 564(Ct.App. 1996), at p. 565; see also, WI Stat § 701.01(7) & § 701.01(6).

The federal rule pertaining to the treatment of revocable trusts as resources for state Medicaid programs, states as follows:

(3)(A) In the case of a revocable trust—

- (i) the corpus of the trust shall be considered resources available to the individual,
- (ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
- (iii) *any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.*

42 U.S.C. § 1396p(d)(3)(A)(Italicized for emphasis); see also 42 U.S.C. § 1396p(c), “**Taking into account certain transfers of assets**”. The state statute concerning the treatment of trusts for divestment purposes is essentially identical. See, WI Stat § 49.454(2); see also, WI Stat § 49.453, generally.

When the petitioner’s spouse died, his revocable trust terminated by its own terms, causing the trust *res* to no longer be available to him or his estate. It was effectively divested on that date, under the terms of state and federal divestment provisions, to his son.

The petitioner’s attorney seeks to inject the *Artac* decision of Court of Appeals into this fact pattern in support of the proposition that the trustee acts on the behalf not of either spouse, but rather on the behalf of the beneficiary of the trust. Fortuitously here, he is one and the same. *Artac* however, is distinguished from these facts. See, *Artac v. Wisconsin Department of Health and Family Services*, 2000 WI App 88, 234 Wis.2d 480, \_N.W.2d\_. That argument is unpersuasive.

In *Artac*, the trust was *irrevocable* at creation, and it was established *prior* to the applicable statutory lookback period applicable to trusts. It concerned a homestead deed that was conveyed to the trust at creation, in which the settlor, Artac, retained a life estate interest. The asset alleged by the county agency to have been divested, in *Artac*, was that life estate interest, retained by Mrs. Artac, as the “institutionalized individual”. That interest was conveyed long after creation of the trust in 1992, i.e., it was conveyed *during* the look-back period by the trustee to the beneficiary of the trust in 1997, by fee simple. At 2000 WI 88 ¶ 14, ¶ 17. That trustee was also a third party, not a beneficiary. In addition, in *Artac*, the Court found that the hearing examiner had specifically concluded that the trustee had divested “on behalf” of the institutionalized individual making the transfer of the life estate a divestment, and that this conclusion was incorrect. That is, the trustee acted on behalf of the beneficiary of the trust, and not the institutionalized individual. At 2000 WI 88 ¶ 4 & ¶ 16. Finally, the *Artac* court specifically stated, at footnote 7, as follows:

DHFS does not contend that Artac herself, or Artac’s spouse, took any action to distribute the trust property as contemplated under 42 U.S.C. § 1396p(e)(1)(A)(1994).

*Artac v. Wisconsin Department of Health and Family Services*, 2000 WI App 88 ¶15, footnote 7.

Here, the trust is *revocable* on its face; it is *within* the lookback period, and the divesting person is *not* the trustee, but the institutionalized individual’s *spouse*. The Department *is* alleging that the spouse took the action to divest the asset. By providing for the termination of the revocable trust at death, paired with the Marital Property Agreement, he was attempting to wipe away his wife’s potential claim against his estate and implement an estate planning result he desired. In other words, gifting his asset with no right of claim by his wife, and an ultimate destination lying with his son. *That* is the divestment event. Thereafter, the trustee son, acting on behalf of himself as beneficiary, transferred title to himself.

A close review of federal Medicaid law supports this view of the facts and applicable law. 42 U.S.C. § 1396p(d)(1) directs that rules on transfers of assets contained in 42 U.S.C. § 1396p(c)(3) apply to trusts. § 1396p(c)(3) indicates that actions taken by “such individual or by any other person” that reduces or eliminates the individual’s ownership or control is a divestment transfer.

The county agency erred in asserting at the hearing that the divestment occurred because the petitioner failed to make a claim against her husband’s estate, based upon a so-called “*Tannler*” basis. In *Tannler v. Wisconsin Dept. of Social Serv.*, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997), the Supreme Court upheld the Handbook provision concerning the refusal to make a claim against an estate. But, at 211 Wis. 2d 186, the Court noted that there should be a certainty that the legal action will be successful. The marital property agreement signed in September, 1999, makes it unlikely that petitioner would succeed in a claim against her deceased husband’s estate. Unless it could be argued that the agreement is invalid, such a claim likely would fail. The agency also incorrectly determined the divestment date was March 3, 2000, because it was incorrect as to the day the petitioner’s husband died. In part, it appears that Ms. Joyce, the petitioner’s POA, may have given that wrong date to the agency at the last hearing. See, Exhibit #8, p.2. However, both are harmless errors, in light of my determination that the divestment determination above was correct on other grounds that were fully litigated by the petitioner after two fair hearings. However, the agency did not demonstrate the calculation of the penalty period was correctly computed, nor that the beginning date was correctly selected. See, WI Stat § 49.453(3); MA Handbook, App. 14.5.0. The petitioner’s attorney correctly asserted that the Notices given were deficient in some respects. The remedy, however, is not simply to grant eligibility to an ineligible person. Rather, it is to make the agency correct the deficiencies.

I will remand the matter to the county agency to issue a written notice showing how the penalty period was computed, and direct it to use a divestment date of April 3, 2000, in doing this computation. If the petitioner disagrees with the computation of the penalty period, she may file a new appeal on that issue, only. The divestment determination, above, is a settled issue of fact and law. She may pursue her appeal or rehearing rights as to the merits of my determination here, not a new hearing on the merits of the divestment determination.

In the petitioner’s brief, her attorney asked for a fair hearing to establish a “hardship” exception to the penalty period. See, WI Stat § 49.453(8) & WI Stat § 49.454(4). That request will not be granted at this time. The petitioner must make such a request to the Department’s representative, the county agency, for a determination. If she is aggrieved by that determination, she may then file a request for a fair hearing to review the agency decision on her hardship request.

### **CONCLUSIONS OF LAW**

The petitioner’s spouse divested \$192,916.86 on April 3, 2000, making her ineligible for MA for an extensive penalty period; the matter will be remanded to the county agency to issue a written notice that includes a mathematical computation of the penalty period applied and a beginning date of the penalty that complies with WI Stat § 49.453(3) and MA Handbook, App. 14.5.0.

**NOW, THEREFORE, it is**

### **ORDERED**

That the matter is remanded to the county agency with instructions to issue a written notice to the petitioner informing her of the calculations used to determine her MA period of ineligibility due to divestment of \$192,916.86, and a beginning date of said penalty period determined in compliance with MA Handbook, App. 14.5.0. Those actions shall be completed within 10 days of the date of this Decision. IT IS FURTHER ORDERED, that the petition for review in all other respects herein be, and the same hereby is, dismissed.

## **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

## **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2001.

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Kenneth D. Duren  
Administrative Law Judge  
Division of Hearings and Appeals  
412/KDD

cc: MILWAUKEE COUNTY DEPT OF HUMAN SERVICES  
DHFS - Susan Wood